Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:PEN:PIT:TL-N-4229-99
MAYost

date:

to: Harold Scheller, Appeals Officer, Pittsburgh

from: Associate District Counsel, Pennsylvania District, Pittsburgh

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subject: [redacted]
Consent to Extend the Statute of Limitations
Tax Years: [redacted] and [redacted]

DISCLOSURE STATEMENT

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ISSUE

Whether a series of consents, with the last one being executed by "[redacted], formerly [redacted]", effectively extend the statute of limitations on assessment for the old [redacted] consolidated group for the tax years [redacted], [redacted], and [redacted].

ADVICE GIVEN

1. The consents effectively extend the statute of limitations for the old [redacted] affiliated group.

[redacted] is merely the new name for the old [redacted] (EIN: [redacted]). Under the consolidated return regulations, [redacted] is authorized to sign consents for the old [redacted] consolidated group for the years [redacted], [redacted] and [redacted].

Through a series of spin-offs and a merger occurring on [redacted] the old [redacted] group divided into two distinct affiliated groups. [redacted], the old common parent, did not cease to exist under state law, but was the survivor corporation in a merger with a [redacted] subsidiary. Simultaneously, the old [redacted] was renamed [redacted]. Immediately prior to the merger with [redacted] old [redacted] set up separate subsidiaries for its [redacted] businesses. On [redacted], the stock of these new subsidiaries was contributed to New [redacted] (EIN: [redacted]), another new subsidiary established by Old [redacted]. New [redacted], thereupon, changed its name to [redacted].

2. Since New [redacted] now bearing the old [redacted] name, received a substantial portion of the assets of the old [redacted] affiliated group, we also recommend that you give consideration to securing a Form 2045, Transferee Agreement, from [redacted], formerly New [redacted] (EIN: [redacted]), covering its potential transferee liability for any tax deficiencies which may be assessed for the consolidated tax years [redacted], [redacted] and [redacted].

DISCUSSION

FACTS

In [redacted], [redacted] wanted to transfer its [redacted] businesses and related assets to [redacted]. The latter, however, was not interested in acquiring [redacted]'s other unrelated business operations. Therefore, in order to complete the deal, [redacted] decided to shed its [redacted] assets.

In [redacted], [redacted] transferred its [redacted] assets into separate operating subsidiaries. According to a comprehensive plan of reorganization, [redacted] set up at least four additional operating subsidiaries, namely:

[redacted] ([redacted]; [redacted] ([redacted]; [redacted] ([redacted]); and [redacted] ([redacted]) The transfer of the operating assets, including the stock of some other [redacted] subsidiaries, into these newly-formed subsidiaries was designed to be tax-free under I.R.C. § 351.

[redacted] also formed New [redacted], a Delaware corporation, as a wholly-owned subsidiary, with EIN [redacted]. The stock of the operating subsidiaries was transferred as a contribution of capital to New [redacted]. [redacted], an existing subsidiary of [redacted], became a subsidiary of New [redacted].[1] The stock transfers to New [redacted] were intended to be tax-free pursuant to I.R.C. §§ 351 and 361. As part of the reorganization, New [redacted] agreed to assume liabilities relating primarily to or arising from the operations of the various businesses transferred by [redacted]. The stock of New [redacted] was then distributed to [redacted]'s public shareholders. New [redacted] then changed its name back to [redacted].

Old [redacted] kept its [redacted] businesses. It also retained a number of subsidiaries, including, among others, [redacted], [redacted], [redacted], [redacted], and [redacted]. These subsidiaries had been included in [redacted]'s consolidated returns for the tax years at issue.

As of [redacted], pursuant to an Agreement and Plan of Merger, dated [redacted], between [redacted] and old [redacted], a transitory subsidiary of [redacted] ([redacted] merged with and into old [redacted] with its shareholders receiving voting shares of [redacted] stock. Old [redacted] survived the merger and retained its old EIN of [redacted]. [redacted]'s position is that the transaction was a "reverse merger" that qualified as a reorganization under I.R.C. § 368(a)(1)(B) and was tax-free under I.R.C. § 354 to its shareholders. As part of the merger, old [redacted] changed its name to [redacted]

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[1] The stock of [redacted] was contributed to [redacted], so that [redacted] became a subsidiary of [redacted].

The Examination team has recently been advised that [redacted] will cease to exist as of [redacted] has few subsidiaries. It conducts most of its business operations through corporate divisions. Thus, it is suspected that [redacted] will be dissolved and the assets placed under the umbrella of a corporate division.

During the course of the examination of old [redacted]'s consolidated returns for the tax years [redacted] [redacted] and [redacted] the Examination Division secured a series of consents extending the statute of limitation on assessment for the old [redacted] consolidated group. The first consent relating to the tax year [redacted] was obtained from [redacted] before the reorganizations in question took place. The consent extended the period of assessment for [redacted] to [redacted]. A succeeding consent for [redacted] bearing [redacted]'s old EIN of [redacted] was obtained from "[redacted]" after its name had been changed to [redacted] This consent, extending the period for assessment to [redacted] was signed by [redacted], who was a corporate officer authorized to the sign a consent for both new [redacted] and [redacted] A third consent extending the period of assessment to [redacted] for [redacted] [redacted] and [redacted] was addressed to "[redacted]", again with an EIN of [redacted] and was executed by [redacted], who was apparently an officer of new [redacted] but not of [redacted] when he signed the consent. However, by resolution of the Board of Directors of [redacted], dated [redacted], the Board ratified as authorized actions of [redacted] the prior actions taken by [redacted] in signing the consent addressed to "[redacted]." The fourth and last consent was obtained from "[redacted], formerly [redacted]." This last consent extends the statute on assessment to [redacted].

LAW AND ANALYSIS

A. Consents

I.R.C. § 1501 grants affiliated groups of corporations the privilege of filing returns on a consolidated basis. If consolidated returns are filed, the members of the group consent to be bound by the legislative regulations promulgated pursuant to the authority in I.R.C. § 1502.

Under Treas. Reg. § 1.1502-77(a), the common parent of the consolidated group is the sole agent for each subsidiary in the group and duly authorized to act in its own name in all matters relating to the consolidated tax liability of the group. The common parent remains the agent for the members of the group for any years during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time.

The express language of Treas. Reg. § 1.1502-77(a) supports the validity of a consent obtained from an old common parent for pre-transaction years after a reverse acquisition where the old common parent remains in existence. See also, Union Oil Company of California v. Commissioner, 101 T.C. 130 (1993).[2]

In [redacted], the Service issued temporary regulations under I.R.C. § 1502. For taxable years for which the due date of the consolidated return (without extensions) is after [redacted], Temp. Treas. Reg. § 1.1502-77T provides alternative agents for purposes of extending the statute of limitations for a consolidated group. Under this regulation, where the common parent of the group ceases to be the common parent, whether or not the consolidated group remains in existence, a consent can be obtained from any one of several alternative agents for the group.[3] The alternative agents under Temp. Treas. Reg. § 1.502-77(a)(4) are:

> (i) The common parent of the group for all or any part of the tax year to which the consent applies;
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> (ii) A successor to the former common parent in a transaction to which I.R.C. § 381(a) applies;
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> (iii) The agent designated by the group under Treas. Reg. § 1.1502-77(d); or
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> (iv) If the group remains in existence after a reverse acquisition or downstream transfer,

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[2] We can not determine on the basis of the present factual information whether the merger of old [redacted] qualified as a reverse acquisition within the meaning of Treas. Reg. § 1.1502-75(d)(3).

[3] The common parent is the highest-tier domestic corporation in the group.

the common parent of the group at the time the consent is given.

In the instant case, [redacted], the common parent of the [redacted] consolidated group during the tax years [redacted], [redacted] and [redacted] remained in existence following the merger with [redacted]. The corporation simply changed its name to [redacted], but continued to use its old EIN. A change in corporate name does not terminate a corporation's existence. Moreover, Treas. Reg. § 1.1502-75(d)(2) provides that a common parent corporation will remain as the common parent irrespective of a mere change in identity, form, or place of organization.

[redacted] also continues to have authority to act as the agent for the members of the [redacted] consolidated group for the years [redacted], [redacted] and [redacted] for which it was the common parent, despite the fact that the consolidated group no longer exists. See Treas. Reg. § 1.1502-77(a) and Temp. Treas. Reg. §1.1502-77T(a)(4)(i). Thus, the consent addressed to and executed by "[redacted], formerly [redacted]", is effective to extend the statute on assessment relating to the consolidated tax liability for the years [redacted], [redacted] and [redacted].[a]

The prior consents for the old [redacted] group, which were mis-addressed to [redacted] after the name of [redacted] was changed to [redacted], are defensible. The consents bear the EIN of [redacted] and it was clearly the intention of the parties that the old common parent of the consolidated group extend the period for assessment. As indicated above, the Board of Directors for [redacted] formally ratified one of these prior consents, when the signing official was not a corporate officer.

On their face, the prior consents addressed to [redacted], but reflecting the EIN associated with [redacted], are ambiguous as to the intended corporate taxpayer. If an ambiguity exists in a consent,

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[a] It should be noted that once [redacted] ceases to exist on or about [redacted] such entity will no longer be available to execute any additional consents, if necessary. The Service will have to look to Temp. Treas. Reg. § 1.1502.77T to determine if there is an alternative agent qualified to sign consents in the future.

extrinsic evidence is admissible to clarify the ambiguity and to determine the intent of the parties, and the consent will then be interpreted in accordance with the parties' intent. See, Woods v. Commissioner, 92 T.C. 776, 780 (1989); Constitution Publishing Co. v. Commissioner, 22 B.T.A. 426, 428 (1931). In this case, the intent of the parties was to have [redacted], as the surviving former common parent, execute the consents. Furthermore, even if no ambiguity is found to exist, since the use of the wrong corporate name appears to be a mutual drafting mistake, the prior consents are not invalid. A court would permit reformation of the consents to reflect the correct corporate name and thereby carry out the actual intent of the parties to have the former common parent extend the period of limitation on assessment for the [redacted] consolidated group for the years [redacted] [redacted] and [redacted]. See Woods v. Commissioner, 92 T.C. at 782-783.

B. Potential Transferee Liability

The ultimate result of the [redacted] corporate reshuffling of [redacted] was to divide the company into two separate affiliated groups. [redacted] kept its [redacted] business and eventually merger with a [redacted] subsidiary. Prior to the merger, however, [redacted] spun off its [redacted] businesses to newly-created subsidiaries and then the stock of these subsidiaries was contributed to New [redacted]. The stock of New [redacted] was then distributed to the public shareholders of [redacted].

Since substantial assets of old [redacted] were transferred to New [redacted] as a result of the reorganization, we recommend that the Exam team seriously consider the possibility that New [redacted] may be subject to transferee liability for any deficiencies which may be assessed for the tax years [redacted] [redacted] and [redacted].

If a taxpayer transfers assets to others, the transferee of the assets may become liable for the taxpayer's unpaid tax either at law or equity under state law. Federal law governs the procedures to assert such liability, but generally state law governs the elements establishing transferee liability.[1] The law

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[1] I.R.C. § 6901 is merely a procedural statute. Curiously, under Treas. Reg. § 301.6901-1(b)(1), the definition of "transferee" for purposes of of I.R.C. § 6901 includes the successor of a corporation or a party to a reorganization as defined in I.R.C. § 368.

of the state in which the transfer occurs governs. Fibel v. Commissioner, 44 T.C. 647 (1965). Transferee liability at law arises by statute or contract, whereas liability in equity normally arises when a transferor is left after the transfer without sufficient assets to satisfy its tax liabilities. In the corporate context, transferee liability generally accrues when a corporation transfers assets to another and the transferee assumes the liabilities of the transferor either expressly or impliedly; the transferee is merely a continuation of the transferor; the transfer amounts to a consolidation or merger; or the transfer is an attempt to escape debts. See West Texas Refining & Dev. Co. v. Commissioner, 68 F.2d 77, 81 (10th Cir. 1933).

As indicated above, New [redacted] agreed to assume liabilities of the old [redacted] group relating primarily to or arising from the operations of the various businesses transferred to it. This assumption of liabilities is arguably broad enough to include Federal income tax liabilities. If so, New [redacted] would be a transferee at law.

For this reason, we recommend that (b)(5)(AC), (b)(7)a [redacted]

(b)(5)(AC), (b)(7)a [redacted]. I.R.C. § 6901(c)(1) provides that the period of limitation for assessment of transferee liability is within one year after the expiration of the period of limitation for assessment against the transferor. The one year extension for the assessment of transferee liability begins at the expiration of the original period of limitation for assessment against the transferor, **as properly extended by statute consents of the transferor.** Field v. Commissioner, 32 T.C. 187 (1959), aff'd per curiam, 286 F.2d 960 (6th Cir. 1960), cert. denied, 366 U.S. 949 (1961). Here, (b)(7)a [redacted].

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